

MINUTES

Ad Hoc Committee on Probate Law and Procedure

Administrative Office of the Courts

450 South State Street

Salt Lake City, Utah 84114-0241

February 15, 2008 - 12:00p.m.

ATTENDEES

Kent Alderman
Kerry Chlarson
Mary Jane Ciccarello
Maureen Henry
Steve Mikita
Julie Rigby

EXCUSED

Judge Reese Hanson
Judge George Harmond
Justice Richard Howe
Judge Gary Stott
Kathy Thyfault

GUESTS

Dr. Cherie Brunker
Dr. Kelly Davis Garrett

STAFF

Diana Pollock
Tim Shea

I. WELCOME AND APPROVAL OF MINUTES

Because Judge Harmond was unable to attend, Tim Shea welcomed the committee members to the meeting. One correction was noted in the minutes. With the correction Mary Jane Cicarello made a motion to accept the minutes from the January 18, 2008. Kent Alderman seconded the motion. The motion carried unanimously.

II. EVIDENCE OF INCAPACITY

Mr. Shea introduced Dr. Cherie Brunker and Dr. Kelly Davis Garrett. They will be addressing ways to explore the evidence of incapacity. Although it is a legal decision, it is nevertheless based on medical and other evidence.

Dr. Brunker explained her professional background to the committee. Dr. Brunker read a common case scenario to the committee. The key points she made:

- The consequences of decision play a large role in the assessment of someone's judgment.
- Partnerships between medicine and law would help both entities understand each other's processes and decisions.

- The ward may score high on some evaluations, however everyday living may be difficult.
- Would a counter-test prove to be a more thorough assessment?
- Could judges rely on the Mini Mental Status Exam?
- The point for medical consent is understanding the options and weighing the risks and benefits of the decision. The Mini Mental Exam does not address this.

Kent Alderman stated that in a normal situation an application for a guardianship is usually perceived as a non-adversarial proceeding. Family members perceive that the individual has declined in function, and there is a need to appoint a guardian.

- Is summary information available to allow the judge to be comfortable stating that a particular case should be a non-adversarial proceeding? The judge could then grant guardianship after an abbreviated proceeding rather than having a full trial with experts on both sides presenting evidence.
- The Code provides for a court-appointed physician to do an evaluation. What level of information in the report would allow the judge to make a determination that the person should have a guardian?

Dr. Brunker proposed that a conceptual model be used and introduced a template to the committee. Dr. Kelly Garrett stated that her area of expertise has focused on the cognition of older adults. Concerns of Dr. Garrett and the committee:

- Capacity for what? The possibility of a limited guardianship to help with particular functional limitations.
- It is Dr. Garrett's experience that requests for clinical evaluations are too vague.
- The ABA Judicial Determination of Capacity in Adults would be helpful to a clinician by focusing the questions.
- The model clinical evaluation was discussed.
- Can clinicians recommend what functions are necessary for an individual to do a specific task?
- The assessment of capacity will be difficult because of the need to focus on the ability of a particular person in a particular situation.
- Using a basic form may not be appropriate if the issues are beyond the physician's training to evaluate.

- There is a need for an evaluation form that will enable the medical care provider to give basic information for the judge to examine.
- If a model report is used, the petitioner could have it completed before filing or upon court order.
- The statute provides that the parties can request an evaluation, and the model report would be helpful in directing the physician's inquiry.
- The model report would provide basic information. If the judge needs more information, the judge could request more.
- Using a court-ordered report would protect the doctor in releasing information about the patient.
- If done outside of a visit, Medicare/Medicaid might not pay for a doctor's time for filling out the report.

It was a consensus of the committee that a form would be helpful. There was committee discussion regarding whether the form should be filed with the petition or wait until a court order. There was a recommendation that the form be amended to include the most critical information.

III. AUTHORITY OF GUARDIAN

Tim Shea stated that he incorporated into the draft statute the suggestions made at the last meeting. There was one additional point with regard to the Mental Health Directive and the Human Services Code. Committee discussion included:

- Having things scattered throughout the Code is not a good idea.
- Can we change the title of an act from "handicapped" to "disabled"?
- Difference between "commitment" and "admission." In the Advance Health Care Directive Law, an agent does have the authority to consent to admission to a mental health facility. Commitment is a different legal status. In setting up an advance mental health care directive, a person can authorize his or her agent to consent to commitment for a short period of time.
- Advance health care directives are used for routine medical decisions, not just for emergencies.
- The order should specify particular authority from the Advance Health Care Statute, not just a general reference.
- Include that the guardian should file an inventory within 90 days after appointment.
- Whether the ward can vote should be specified.

A subcommittee of Maureen Henry, Mary Jane Ciccarello, and Kent Alderman will discuss this section and bring back recommendations.

IV. REPRESENTATION OF PROPOSED WARD

Tim Shea stated that he had made the changes to the draft statute and rules that the committee had asked for. He said he was comfortable with everything except the delineation of fees for particular services. The fee as originally drafted would be \$50.00 per hour, and the judge could review whether the estate or the state will pay this. The committee had wanted to consider a set fee for particular services. Mr. Shea asked for direction with this issue. Committee discussion:

- The fee should be an hourly fee approved by the court.
- The rule provides that if counsel is of the ward's choosing, the court would not appoint anyone.
- The court can review the qualifications of the ward's choice.

V. MONITORING PROGRAM

Mr. Shea stated that the Policy and Planning Committee recommended that this committee pursue a program where volunteers would have the responsibility to periodically visit the ward and to review the annual reports. This would give the judge some independent verification that the ward is being treated well. The coordinator would be a paid position, (a court staff person) whose job is to recruit and train volunteers.

The committee adjourned at 2:35 p.m. The next meeting is March 21, 2008 at 12:00 p.m.